IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 268, 269, 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

AND IN THE MATTER OF LONG VIEW II LIMITED

AND IN THE MATTER OF GLOBAL FIXED INCOME FUNDS I LIMITED

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

- and -

PRINCIPAL INVESTING FUND I LIMITED
LONG VIEW II LIMITED
GLOBAL FIXED INCOME FUND I LIMITED

First Respondents

- and -

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED
LV II INVESTMENT MANAGEMENT LIMITED
FLOREAT INVESTMENT MANAGEMENT LIMITED

Second Respondents

- and -

(1) BLUE WATER LIMITED
(2) AMIDA GROUP HOLDINGS

Non-Party Applicants

IN CHAMBERS

Appearances:

Mr James Collins KC instructed by Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner and the Non-Party Applicants

Mr Tom Weisselberg KC instructed by Mr Ben Hobden and Mr Alan Quigley of Forbes Hare for the Second Respondents

Before: The Hon. Justice Kawaley

Heard: 7 December 2022

Draft Judgment circulated: 10 January 2023

Judgment Delivered: 26 January 2023

HEADNOTE

Discovery-application for release from implied undertaking to permit deployment of discovered material by non-parties in foreign arbitration-single law firm retained by parties and non-parties to oversee discovery process-whether documents belonging to non-parties within the parties' 'possession, custody or power'-application to inspect court file to permit non-parties to deploy joint provisional liquidators' reports in foreign arbitration-GCR Order 24 rule 22-Companies Winding Up and Restructuring Rules 2018 rule 26 rule 4

Introductory

1. The present proceedings were commenced by Petitions dated 14 September 2021 presented by the Petitioner acting by receivers Mr Michael Pearson and Ms Trudy-Ann Scott (who have been appointed over shares held by the Petitioner in each of the First Respondents) against each of the three First Respondents, respectively. The Second Respondents are the holders of the management shares in each of the First Respondents, respectively, who were referred to broadly as "Floreat Management". The Petitioner seeks to wind up each of the First Respondents on the grounds that there has been a justifiable loss of confidence due to the mismanagement of the substantial assets invested by Mr Wang at the instance of the "Floreat Principals".

2. The Non-Party Applicants controlled by Mr Wang are involved in London Court International Arbitration proceedings (the "LCIA Proceedings") commenced against them by the "Floreat Parties" with a view to recovering substantial fees said to be due to them. Only the Second Respondent in FSD 269 of 2022 is a party to both one of the petitions and the LCIA Proceedings. However, the Non-Party Applicants herein as Respondents in the LCIA Proceedings dispute liability in significant part based on the same wrongdoing complained of by the Petitioner in the present proceedings. The Petitions herein are currently scheduled for hearing on 3 April 2023 while the arbitration hearing is scheduled to commence on 15 May 2023.

3. The Petitioner contends that the "substantial overlap" between the evidential issues to be explored by both factual and expert witnesses in the present proceedings and the LCIA Proceedings, and the timing of the two sets of proceedings, justify the present applications. The Petitioner seeks two heads of relief under their 12 September 2022 Summonses against each of the three respective Second Respondents:

> "*2. An Order that the Petitioner be granted a limited release from any implied undertaking not to disclose outside of these proceedings documents served by the Second Respondent, including discovered documents, so as to permit the Petitioner to provide copies of those of the documents that are relied upon by the Petitioner in these proceedings to Blue Water Limited and Amida Group Holdings solely for the specific purpose of them seeking to introduce those documents into the related ongoing arbitration proceedings, LCIA Arbitrations Nos. 215317 and 215318.*
>
> *3. A declaration that the documents comprising the 2TB of documents provided to Herbert Smith Freehills (**HSF**) from 61 custodians as described in the First Affidavit of Andrew John Cooke at paragraph 20.1, together with any further documents provided to HSF as part of the data collection exercise described therein, are in the possession, custody or power of the Second Respondents and are therefore discoverable in these proceedings.*"

4. The Non-Party Applicants, under a second trio of 12 September 2022 Summonses, apply:

> "*pursuant to the Companies Winding Up Rules 2018 O.26 r.4 for permission to access the Court File in these proceedings and take copies of documents, including the reports of the joint provisional liquidators in so far as they relate to the Cayman Funds…solely for the purpose of seeking to introduce those documents into confidential arbitration proceedings under LCIA Arbitrations Nos. 215317 and 215318.*"

5. These applications were referred to by the parties as the Release Applications[1], the Declaration Applications and the Court File Applications.

The Release Application

The Petitioner's submissions

6. As regards the critical factual matrix, the Skeleton of the Petitioner and Non-Party Applicants' Skeleton Argument submitted as follows:

> "2. *…the purpose of the Release Application and the Court File Application is to enable justice to be done in the Arbitration, and to avoid serious practical and other difficulties that would arise if the relief sought were not granted. The overwhelming majority of the documents the subject of these applications will enter the public domain during the trial of these proceedings and thus be available for deployment in the Arbitration in any event. The Release Application and Court File Application are designed to ensure that this can be done earlier and in an orderly manner, rather than materials only becoming available when the final preparations for the Arbitration are under way, with all the associated disruption…*

[1] The Second Respondents' term was "Collateral Use'.

13. There is very significant overlap between the issues in these proceedings and the issues in the Arbitration. As the Court knows, Mr Wang's position in these proceedings is that there has been substantial wrongdoing in the management and operation of the Cayman Funds (and the BVI Fund, RAGOF). The same wrongdoing is relied on by the Wang Parties as part of their defence and counterclaim in the Arbitration…

14. Previously, this overlap was common ground. See, for example, Forbes Hare's second letter dated 26 May 2022 which referred to the 'substantial overlap' between the two sets of proceedings, which contain 'the same and similar detailed allegations of improper conduct by the Floreat Parties'. In previous submissions to this Court the Second Respondents recognised that the two disputes involved 'the same factual and legal issues'.

15. Only when faced with the Release and Court File Applications did the Second Respondents seek to downplay the extent of the overlap. This is unconvincing. Of course, different relief is sought in each claim (here a winding-up order, there payment of fees), and so the framework differs, but the issues requiring determination are in many respects the same…

16. There is also substantial overlap between the parties…"

7. The nature of the factual matrix was not ultimately in controversy; the dispute centred on the true purpose of the legal principles applicable to granting a release and whether the circumstances of the present case justified exercising the discretionary judicial power in favour of the Petitioner. The Petitioner's submission that the only documents in issue were those produced upon discovery, and that the implied undertaking only applied to documents produced through

compulsion, was also not disputed at the hearing[2]. Nor were the following general summary of principles subject to any material dispute:

> "*23. In relation to release from the implied undertaking, the leading case is Crest Homes Plc v Marks [1987] AC 829, referred to by Smellie CJ in Grupo Torras SA v Bank of Butterfield International (Cayman) Limited (2000) CILR 452 at 471. The basic principle (per Lord Oliver in Crest Homes at 860B-C) is that the Court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. The burden is on the applicant, and cogent and persuasive reasons must be shown (859G).*
>
> *24. Beyond that, it is a question for the court on the particular facts of each case. However, the Courts have tended to look favourably on applications for a release for the purposes of use in other proceedings, at least where the two actions are closely related: see e.g. Sybron Corp v Barclays Bank Plc [1985] Ch 299 and Lakatamia Shipping v Su [2020] EWHC 3201 (Comm); [2021] 1 WLR 1097. Whilst the question is fact-dependent, there is a strong public interest in facilitating the just resolution of civil litigation: Tchenguiz v Serious Fraud Office [2014] EWCA Civ 1409 at [66].*" [Emphasis added]

8. In oral argument, Mr Collins KC, submitted that it was common ground that special circumstances were required to justify a release and injustice would be an impediment although that was not an issue in the present case. The central aim of the Release Application (and the Court File Application) was to deal with documents "outwith" the Arbitral Tribunal. Moreover, the release was not sought in respect of all discovered documents, but merely those the Petitioner was positively relying upon in the present proceedings, and which would likely enter the public domain through being referred to in Open Court at trial (GCR Order 24, rule 22). While he submitted that the public interest in facilitating the just resolution of civil litigation applied to facilitating the deployment by non-parties in foreign arbitration proceedings, he accepted that

[2] *Prudential Assurance Company Limited-v- Fountain Page* [1991] 1 WLR 756 at 769F.

there was seemingly no authority illustrating the exercising of the release jurisdiction in such a context.

The Second Respondents' submissions

9. The Second Respondents' Skeleton Argument referred to local authorities which have considered the implied undertaking principle: *Grupo Torras S.A -v-Bank of Butterfield International (Cayman) Limited* [2000 CILR 452] at 470, 471; Braga-*v-Equity Trust Co (Cayman) Ltd* [2011 1 CILR 402] at paragraph 89. It was submitted that the burden lay on the applicant to "*demonstrate cogent and persuasive reasons why the implied undertaking should be released*". The English legal position was contrasted with the Cayman Islands position. CPR rule 31.17 expressly confers a power to disclose documents for use in existing court proceedings and the power conferred by section 44 (2) (b) of the Arbitration Act 1996 (UK) to order disclosure in favour of a domestic arbitration does not extend to aiding a foreign arbitration: *DTEK Trading SA-v- Morozov* [2017] 1 CLC 53.

10. Mr Weisselberg KC emphasised these points of distinction between the English and Caymanian legal terrain in oral argument, cautioning the Court about the dangers of taking vague notions of doing justice too far. Most significantly, he argued that the present applications were effectively a case management exercise in relation to the LCIA Proceedings. The Arbitral Tribunal had declined to positively invite the Non-Party Applicants to seek this Court's assistance. The LCIA Proceedings were separate proceedings governed by their own rules which this court ought not to be concerned to supplement and the possibility of inconsistent findings was entirely aligned with the distinctive character of the two sets of proceedings. There were no special circumstances here and the application, it was contended, was contrary to principle. On the facts, he conceded there was some overlap of issues but insisted it would be wrong to ignore the separate legal personality of corporate entities altogether.

Legal Findings

11. The Release Application requires the Court to determine whether the discretion to release the Petitioner from its implied undertaking not to use the fruits of discovery obtained in these proceedings should be released to enable the Non-Party Applicants to deploy that material (most of which will likely enter the public domain in 3-4 months' time) now in the LCIA Proceedings. The implied undertaking is a common law rule, not a statutory one[3]. However, GCR Order 24 rule 22 acknowledges the existence of the rule in a provision which is pertinent to the present application:

> "***Use of documents and transcripts (O.24, r.22)***
> *22. Any undertaking, whether expressed or implied, not to use a document or transcript for any purposes other than the proceedings in which it is disclosed or made shall cease to apply to such document or transcript after it has been read to or by the Court, or referred to in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs or by whom the oral evidence was given.*"

12. The Petitioner relies heavily on the practical ramifications of this rule. If the documents it seeks to make available to its allies in the LCIA Proceedings now will be released by operation of law on the eve of the commencement of the hearing of those proceedings, it will facilitate the fair and efficient conduct of the arbitration to release the material now. These proceedings, it is argued, will also benefit through reducing the risk of inconsistent findings on the overlapping issues. There is no justification, the Second Respondents countered, in this Court providing unsolicited case management assistance to the Arbitral Tribunal. In the absence of any authority dealing with a similar factual and legal context, one has to burrow down beneath the surface of the governing legal principles. Two *dicta* to which Mr Weisselberg KC referred are particularly instructive.

[3] Contrast the English position; CPR 33.21 now applies.

13. Firstly, the observations of Anthony Smellie CJ in *Grupo Torras S.A. –v- Bank of Butterfield International (Cayman) Limited* [2000 CILR 452] at 470:

> "*There is no dispute about the legal principles. The starting point must be with the settled principle that documents disclosed on discovery in a court action are disclosed subject to an implied (if not expressed) undertaking from the receiving party not to use them for any purpose other than the proper conduct of the action and, in particular, that the documents will not be used for any collateral or ulterior purpose. The undertaking is given not to the party disclosing but to the court, although the prevention of prejudice to the party disclosing is an important reason for the undertaking. It follows that the undertaking may be released or varied only upon an order of the court and the documents can only be used for other purposes with the leave of the court or the consent of the party giving discovery.*
>
> *The law is that only in exceptional circumstances are such undertakings to be released or varied by the court. This is primarily for the reason that their importance lies in the preservation of the confidence of parties to litigation that the information they disclose in, and exclusively for the purpose of, litigation, will not be abused to their detriment in another context. This abuse is the 'collateral or ulterior purpose' mentioned above and it is anathema to the encouragement of full and frank disclosure, which is essential to the just disposition of cases before the courts.*"

14. The then Chief Justice went on (at 471) to cite as an example of exceptional circumstances his own decision in *Hoyes-v-Gas Monitoring Inc.* [1994-95 CILR 504] where a release was granted to prevent a litigant from using the undertaking "*as a cloak for his own fraudulent conduct elsewhere*". Secondly, the Second Respondents' counsel referred in oral argument to the following *dicta* of Steyn J in *Vardy -v- Rooney* [2022] EWHC 304 (QB):

"*In Lakatamia shipping company limited & Ors v Morimoto [2020] EWHC 3201, Cockerill J reviewed the authorities and summarised the propositions that they establish at [46] to [66]. So far as relevant to the current case, those propositions are:*

i) The terms of CPR 31.22(1)[4] reflect the terms of the implied undertaking as to the use of documents that arose at common law. The CPR provision now represents the complete code on this subject. The prohibition applies not just to documents themselves but to the information derived from those documents: Lakatamia [47] and [49], citing Smithkline Beecham v Generics [2004] 1 WLR 1479.

ii) The prohibition on collateral use exists for sound and long-established public interest reasons. One reason is that compulsory disclosure is 'an invasion of a person's private right to keep one's documents to oneself and should be matched by a corresponding limitation on the use of the document disclosed'. Another is in order to encourage those with documentation to make full and frank disclosure of it, whether helpful or not - on the footing that, subject to exceptions, it will not be used save for the proceedings in which it is disclosed: Riddick v Thames Board Mills [1977] 1 QB 881, 896; IG Index v Cloete [2014] EWCA Civ 1128[42-3]': Lakatamia, [47] and Tchenguiz v Serious Fraud Office [2014] EWCA Civ 1409, [66].

[4] CPR 31.22 provides:

"*(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—*

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

iii) On its face, CPR 31.22(1) provides a clear indication that the default position is that collateral use is not permitted: Lakatamia, [45].

iv) The court will only grant permission under rule 31.22(1) (b) if there are 'special circumstances which constitute a cogent reason for permitting collateral use': Tchenguiz v Serious Fraud Office [2014] EWCA Civ 1409, [66], Lakatamia, [51].

v) The burden is on the party making the application to demonstrate cogent and persuasive reasons for allowing the collateral use sought: Lakatamia, [53]."

15. Both of these cases confirm that the implied undertaking serves a clear public policy function. Justification for releasing a party from the undertaking will generally entail demonstrating that either:

(a) there is some countervailing public policy imperative which warrants declining to enforce the general rule; or

(b) although the proposed use is technically beyond the scope of the implied undertaking, it does not fundamentally undermine the policy rationales underpinning it.

16. Mr Collins KC submitted that the countervailing public policy imperative which justified releasing the Petitioner from its undertaking in each set of proceedings was facilitating the just resolution of civil disputes. This submission relied upon the restatement of principles by Cockerill J in *Lakatamia Shipping Co Ltd-v- Su* [2021] 1 WLR 1097 at 1108:

"*50. The fact that documents have been produced in one set of proceedings does not mean that they are not disclosable in another set of proceedings. Rather, this creates a tension between two legal obligations, which can only be resolved by the Court (see Knowles J at [22-24] of Tchenguiz v Grant Thornton [2017] EWHC 310 (Comm) | [2017] 1 WLR 2809).*

51. The leading summary of the principles is to be found in Tchenguiz v Serious Fraud Office at [66]:

'The general principles which emerge are clear:

i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.

ii) The collateral purpose rule contained in section 9 (2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension.

iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above.

iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution.

v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law (as in Gohil) or failed to take proper account of the conflicting interests in play (as in IG Index).'" [Emphasis added]

17. In *Lakatamia*, Mrs Justice Cockrill identified, *inter alia*, the following factors as weighing in favour of granting permission to the applicant to use documents disclosed in one proceeding in another:

"*126. The first and by far the most powerful is the position as regards Mr Su. This can be regarded as a single factor, or a constellation of factors. But whichever way one*

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arranges it, there is very much to be said about the unattractiveness of depriving Lakatamia of the ability to deploy these documents. Lakatamia points out that one of the acts that constituted the unauthorised collateral use (ie. running the Morimoto Search Terms on the Search Order documents) was an act that Mr Su should himself have performed in accordance with his obligations in the Morimoto Proceedings.

127.That links to the points that:

i) The Morimoto Proceedings arise out of and are closely related to Lakatamia's efforts to enforce the Judgment Debt. Lakatamia are therefore entitled to pray in aid in this context the strong public policy in favour of promoting the enforcement of judgments;

ii) The existence of separate proceedings is to some extent a fortuity in that had the Monegasque Villas been sold earlier these allegations would have come into the main trial, under a slightly different guise (here a citation of Lord Oliver in Crest Home Plc v Marks at 860C-D is apposite);

iii) If Lakatamia is right in its allegations in the Morimoto Proceedings there has been a conspiracy to prevent the enforcement of a debt in the order of US$60 million owing under judgments of this Court and that it is in the public interest to determine on proper evidence whether such a serious attempt to undermine the administration of justice in fact occurred.

128. This factor, or constellation of factors, is powerful." [Emphasis added]

18. The public interest considerations taken into account in *Lakatamia* were far more compelling and clearly defined and the proceedings the applicant sought to deploy them in only had to be commenced separately fortuitously. *Sybron Corpn-v-Barclays Bank* [1984] 1 Ch 299 was not referred to in oral argument and provides no material support for the present application. After commencing the first action, the applicant commenced a separate proceeding in respect of the

same claim against additional defendants for limitation reasons. This case is clearly distinguishable for two reasons. Firstly, the relevant English rules did not permit the collateral use of documents referred to in Open Court, so the 'alternative remedy' available here did not arise. Secondly, the critical finding of Scott J (as he then was) was as follows[5]:

> "*…the causes of action in the 1981 action and the 1983 action are the same. That being so, common sense seems to me to argue in favour of granting leave. Use of the documents in the 1983 action is, as I have held, outside the scope of the implied undertaking given as a term of the discovery in the 1981 action. But it is not inconsistent with the broad purpose for which discovery was given…*"

19. In *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409, Jackson LJ gave the leading judgment of the English Court of Appeal and set out (at paragraph 66) the statement of principles quoted at paragraph 51 of *Lakatamia* (set out above). In this appeal, the first instance refusal to permit collateral use was upheld on the grounds that the public interest in protecting confidentiality of documents obtained by the Serious Fraud Office was overwhelming. And so, this case provides no direct support for the proposition that "*facilitating the just resolution of civil litigation*" can potentially be relied upon as a basis for permitting the collateral use of disclosed documents in other proceedings, let alone foreign arbitration proceedings in which the applicant is not even directly involved. However, Jackson LJ was summarizing established principles based on cases cited before him. Two cases provide some support for the notion of having regard to general considerations of civil justice in the context of a collateral use of documents application. The first case is sufficiently described in Jackson LJ's judgment:

> "*61. The issue in SmithKline Beecham Plc v Generics (UK) Ltd [2003] EWCA Civ 1109; [2004] 1 WLR 1479 was whether documents disclosed in patent proceedings could be used in a later patent action. The Court of Appeal made an order under rule 31.22 permitting such use. The court cited with approval a dictum in pre-CPR authority to the*

[5] At page 327G.

effect that simple assertions of confidentiality and damage done by publication should not prevail. The court will require specific reasons why a party will be damaged by publication. The most important consideration is the interests of justice. That involves weighing up the interest of the party seeking to use the documents and the interest of the party protected by rule 31.22."

20. This suggests that the exercise of the discretion is informed by an assessment of what justice requires when the competing interests are being weighed against each other. The second case, *IG Index Ltd-v- Cloete* [2014] EWCA Civ 1128, requires attention to the judgment to discern what the "*powerful factors weighing in favour of granting permission*" actually were. This case was a retrospective permission case where a second proceeding was struck-out on the grounds that documents obtained through discovery in earlier proceedings had been used by the claimant in both proceedings without permission of Christopher Clarke LJ (as he then was, delivering the leading judgment) observed:

"*53. It is, first, necessary to stand back and examine the result of the judge's rulings. Their effect is that, although, after his employment had ended, Mr Cloete got into his possession (at his request) copies of highly confidential documents of IG Index, and although Singh J thought it right (a) to order the destruction of the electronic copies thereof; (b) to grant an interlocutory injunction against copying and use; and (c) ordered Mr Cloete to pay the costs of the application, IG Index have ended up in a position where they have no order or undertaking in their favour precluding Mr Cloete from using the Confidential Information, nor any prospect of obtaining one in the action, and are required to pay all of Mr Cloete's costs.*

54. I recognise that the rule that disclosed documents are not to be used in other proceedings without the leave of the court is an important one; that its importance may mean that those who proceed without permission may find themselves subject to serious sanction even though, had they asked for permission in advance, it might well have been

given. At the same time the result of the judge's order seems to me difficult to square with the overriding obligation to deal with cases justly."

21. The "*the overriding obligation to deal with cases justly*" was applied in that case to deal with an unusual and striking instance of injustice at a stage in the litigation where the merits of the collateral user's substantive rights had already been established. But this case (*IG Index Ltd-v-Cloete*), which informed the summary of principles articulated in *Tchenguiz v Serious Fraud Office* (at paragraph 66), nonetheless does support the proposition that "*facilitating the just resolution of civil litigation*" may in some circumstances constitute a significant ground for permitting the collateral use of discovered documents. I would accordingly summarise the relevant principles supported by the case law cited by counsel as follows:

(a) the implied undertaking serves a public policy objective of encouraging litigants to comply with their discovery obligations by ensuring that documents disclosed can only automatically be deployed in the proceedings in which disclosure occurs;

(b) applications to be released from the implied undertaking can only be granted in special circumstances because if applications are granted too freely the policy underpinning the common law rule would be undermined at best and at worst would become a legal creature akin to Lewis Carrol's disappearing Cheshire Cat;

(c) whether it is appropriate to grant a release requires a weighing of the competing factors in favour of and against permitting collateral use;

(d) where the subsequent proceedings are between the same parties and concern the same, similar or related claims, the case for granting a release is likely to be stronger because the new deployment of the documents does not entail a complete departure from the purpose for which they were initially disclosed;

(e) no case was cited where the beneficiary of the proposed permission for collateral use was not a party to the proceedings in which the implied undertaking arose. However, there does not appear to be any established rule of law or practice precluding a non-party from deploying such information if the applicant obtains permission for this to occur;

(f) no case was cited where the application for permission to use discovered material in other proceedings concerned foreign arbitration proceedings. However, there does not appear to be any established rule of law or practice precluding such collateral use if the party who stands to gain (the applicant) obtains permission for this to occur;

(g) while the discretion to grant the release is ultimately an unfettered one, judicial experience in relation to its exercise spans several decades. Where an application appears to entail extending the scope of the release jurisdiction beyond its recognised parameters, this Court should in my judgment proceed with caution. There is likely in these circumstances to be a heightened risk that the Court may unwittingly undermine the function of the implied undertaking by expanding the opportunities for obtaining a release too far;

(h) promoting the just determination of civil litigation is a broad policy consideration which may properly inform whether or not a release should be granted to some extent. However, the decided cases suggest that this policy factor is never deployed in a loose and liberal manner. This factor is likely to have greatest traction where the refusal of permission for collateral use will potentially undermine the applicant's ability to obtain substantive justice through pursuing an additional claim.

Merits of Release Application

22. The Seventh Pearson Affidavit makes the following key introductory averment:

> "*11. Given the common ownership of Blue Water, Amida and the Shares (**Common Ownership**), Mr Wang is ultimately the party who stands to gain or lose in these proceedings and the LCIA Proceedings. In prosecuting the overlapping allegations of wrongdoing in both this Court and the LCIA Tribunal, the interests of Blue Water, Amida and the Petitioner are therefore aligned.*"

23. The Joint Receivers consider it appropriate to consent to the release of the material the Non-Party Applicants seek in light of the alignment of interests and the fact that the LCIA Arbitration Proceedings are confidential. The deponent accepts that the application ultimately turns on legal argument and only supports a limited release similar to the scope of the implied undertaking arising in relation to discovery. The First Affidavit of London solicitor Bruce Macauley of Skadden, Arps, Slate, Meagher and Flom UK LLP sworn on behalf of the Non-Party Applicants provides the legal policy underpinning for the Release Application. In summary it is asserted that:

(a) there is a risk of serious prejudice if his clients are forced to rely upon "*an incomplete and unsatisfactory evidential record*";

(b) there is a risk that there will be an inequality of arms in the LCIA Proceedings because the Floreat Parties will be able to cherry-pick what documents they disclose in those proceedings;

(c) the ability to conduct the present proceedings and the LCIA Proceedings in a proportionate manner by using the same witnesses will be undermined if the Cayman Materials cannot be used in the LCIA Proceedings;

(d) the timetables of the present proceedings and the LCIA Proceedings are such that the Cayman Materials would only come into the public domain immediately before the arbitration commences: "*The disorder created by this process would cause significant prejudice to all parties in the LCIA Proceedings.*"

24. The Petitioner's Skeleton Argument set out (at paragraph 29) the following four "*key reasons*" justifying the grant of the release:

> (a) "*…the Tribunal in the Arbitration should have access to the best available evidence to ensure that justice can be done. This is a basic but central point…the risk of inconsistent decisions should be avoided as far as possible*";
>
> (b) "*if permission is not granted then there is a serious risk of* ***unfairness and an inequality of arms*** *in the Arbitration*";
>
> (c) "*the preparation of evidence in the Arbitration would be* ***practicably unworkable*** *if permission were not granted*";
>
> (d) "*permission will allow for the orderly deployment of material in the Arbitration which is likely to be deployable in any event, subject only to the question of timing*".

25. It is readily apparent that although in formal terms the Release Application is being made by the Petitioner, in substance the application is being made for the benefit of the Non-Party Applicants The four "key reasons" relied upon by the Petitioner all relate to the need to ensure that the LCIA Proceedings are conducted in a fair, proportionate and orderly manner. A subsidiary point made in support of the first key reason for granting the Release Application does refer to the wider undesirability of inconsistent decisions, but this point has little resonance in light of the fact that most of the parties in the two sets of proceedings are different. The underlying implicit thesis of the application may be stated as follows: because of overlap or alignment of commercial interests and legal and factual issues in the present proceedings and the LCIA Proceedings, this Court's own case management powers should be deployed in aid of the LCIA Proceedings.

26. As Mr Weisselberg KC correctly contended, at the heart of the Release Application is an invitation to this Court to provide unsolicited case management support for the LCIA Proceedings. The Tribunal understandably did not wish to make, in the absence of any recognised legal framework for such a request, a formal invitation to this Court to assist it. I infer from the record of the request made to the Tribunal that any assistance this Court could provide would be welcome. But the merits of the Release Application essentially turn on whether assisting the fair

and proportionate conduct of foreign arbitration proceedings between parties who are not identical to those in the present proceedings is a valid ground for permitting the collateral use of material disclosed in proceedings before this Court.

27. I have no difficulty in concluding that if this broad ground is a legally valid one, the fairness and, more clearly, the proportionality of the LCIA Proceedings would be enhanced to a material extent. The most obvious benefits would be saving costs and time through permitting overlapping preparation to take place in relation to the two proceedings and avoiding the need for the Non-Party Applicants to seek to postpone the presently scheduled arbitration hearing until such time as the material sought becomes freely available because the Petitioner has referred to it in Open Court at the trial of the present proceedings.

28. The factors weighing in favour of granting the release sought in circumstances where the material sought will likely enter the public domain in four to five months' time in any event predominantly revolve around facilitating the existing hearing timetable in the Arbitration Proceedings. On the periphery, an additional factor is reducing the risk of inconsistent findings on overlapping issues. This factor would in my judgment carry greater weight if (1) the parties were identical, which they are not and/or (2) the Arbitration Proceedings might fairly be viewed as ancillary to the present proceedings e.g., some form of enforcement of this Court's own judgment or orders. It is clear from the Tribunal's Procedural Order No. 2 that there is material which would be relevant; but the high point of the Non-Party Applicants' case as regards the requirements of justice is the Tribunal's understandably tentative view that it "*may be that individual documents if revealed may contribute to a just result*".

29. The factors weighing against the granting of the release sought are the following and they carry the day:

(a) the purpose for which the release is sought, assisting non-parties to adjudicate similar legal and factual issues in foreign arbitration proceedings, is not closely connected to the purpose for which discovery was given in the present proceedings;

(b) the fact that common issues are being litigated in different proceedings by (mostly) different entities under common ownership is far from exceptional and is likely to be a common occurrence;

(c) the policy underpinning the implied undertaking would potentially be weakened with no corresponding public policy benefit if the generic context of common ownership sufficed to justify the collateral use of material disclosed in one action to one party by another party in separate unrelated proceedings;

(d) while it may be desirable for the courts of one jurisdiction to assist the efficient conduct of foreign arbitral or judicial proceedings, there is no discernible existing common law rule to this effect. Any new developments in this direction are best left to Parliament or the Rules Committee, and lies beyond the competence of this Court to incrementally develop judge-made law[6].

30. The Release Application is accordingly refused.

The Court File Application

The Non-Party Applicants' Submissions

31. The distinctive legal basis for the Court File Application was addressed in written argument as follows:

[6] While preparing a judgment in another case just before the present Judgment was being finalized for delivery, I discovered that a statutory basis for providing interim support to foreign arbitration proceedings does appear to exist in sections52-54 of the Arbitration Act 2012. Whether those provisions provide an alternative basis for the Petitioner's present application lies beyond the scope of the present Judgment and would in my judgment require a fresh application.

> "*25. The Companies Winding Up Rules, 2018 provide in O. 26 r. 4 for any person who does not have an absolute right to inspect the Court file to do so with special leave of the Court.*
>
> *26. Where documents have been read or referred to in open court, the principle of open justice generally prevails such that third parties will be permitted to access (and use) such documents. An application which does not engage the open justice principle directly may still be made if there are strong grounds for holding that it is in the interests of justice to allow the third party access: Re Z [2019] EWCOP 55, per Morgan J at [22]–[25].*
>
> *27. Here again, the Courts have consistently recognised that a desire to use documents in other proceedings can provide a legitimate interest in inspecting the court file, including in cases in which the documents have not (or not yet) been referred to in open court: see e.g. Sayers v Smithkline Beecham Plc [2007] EWHC 1346 (QB) and HSH Nordbank AG v Saad Air [2012] EWHC 3213 (Comm).*"

32. It was implicitly contended, it appeared to me, that the jurisdiction to grant special leave to inspect the file under CWR Order 24 rule 6 was more flexible than the jurisdiction to permit collateral use of documents disclosed in one set of proceedings in other proceedings. The same arguments for granting both applications were advanced. However, as regards the documents covered by the Court File Application alone, it was submitted:

> "*29.3 The JPL Reports (which were produced by the JPLs and are not the subject of the Release Application but only the Court File Application) set out the results of the JPLs' investigations in relation to the Cayman Funds. Those findings are undeniably relevant to the issues regarding the management and operation of the funds in these proceedings, and – given the overlap – should likewise be available in the Arbitration. To leave the Tribunal to determine issues of wrongdoing in relation to the Cayman Funds without the benefit of considering the reports of the Court-appointed officers tasked with investigating the affairs of those funds would plainly be unjust*."

33. The First Macauley Affidavit makes it clear that inspection of the file is only sought in respect of documents (including the JPLs' Reports) which are relevant to the Cayman Funds and not caught by the implied undertaking. Very forthrightly, it is positively argued that inspection should be permitted not in the interests of open justice but rather to support the more efficient and fair conduct of the LCIA Proceedings.

34. As regards the critical legal test under the Rules, reliance was firstly placed on *Re Z* [2019] EWCOP 55[7], per Morgan J:

> "*2. In the present case, there was no hearing in open court. Ms Angus, for EF and GH, submitted that the open justice principle was simply not engaged in this case and was not relevant to JK's application for disclosure of documents. The decision of the Court of Appeal in Dring is relevant to that submission. The Court of Appeal considered the earlier decision in Dian. It was explained (at [116]) that the application for disclosure of documents in Dian related to documents in respect of three interlocutory applications. One of these applications was determined in open court, one was determined on the papers (an application for permission to serve out of the jurisdiction) and a third was*

[7] The relevant provisions of Court of Protection Rules set out in the judgment provide as follows:

"*5.9.— Supply of documents to a non-party from court records*

(1) … a person who is not a party to proceedings may inspect or obtain from the court records a copy of any judgment or order given or made in public.

(2) The court may, on an application made to it, authorise a person who is not a party to proceedings to—

(a) inspect any other documents in the court records; or

(b) obtain a copy of any such documents, or extracts from such documents.

(3) A person making an application for an authorisation under paragraph (2) must do so in accordance with Part 10.

(4) Before giving an authorisation under paragraph (2), the court will consider whether any document is to be provided on an edited basis."

ultimately not pursued. In Dian, the judge allowed access to documents relating to the application which had been considered in open court and also those relating to the application which had been considered on the papers; however, the judge refused access in relation to the application which was not pursued. In relation to that application, the judge said that such an application should generally be refused unless there were strong grounds for thinking that it was necessary in the interests of justice to allow inspection.

23. The Court of Appeal in Dring, at [126] and [128], approved the approach adopted in Dian. Thus, the open justice principle applies where there has been a hearing in open court (whether or not a judicial decision was given) and to an application which leads to a judicial decision on the papers (that is, where there has not been a hearing in open court). Further, something akin to the open justice principle applies where there has been an application which is not pursued but where "there are strong grounds for thinking that it is necessary in the interests of justice" to allow a non-party to have access to the relevant documents.

24. ABC v Y involved a series of hearings in private. Later, a non-party applied for disclosure of relevant documents. The judge held that as there had been a good reason for holding the hearings in private there was similarly a good reason for not allowing a non-party to have access to the documents. The judge said, in the light of Dian, that even where there had not been a hearing in open court, the court could still permit a non-party to have access to documents where there were strong grounds for thinking that such access was necessary in the interests of justice. As there had been judicial decisions at private hearings in that case, then following Dian (as explained by the Court of Appeal in Dring) the judge could have held that the open justice principle was engaged but it was still open to the judge to dispose of the case in the way in which he did. Essentially his view was that if there had been a good reason, notwithstanding the principles as to

open justice, to hold the hearings in private, that would normally also be a good reason to withhold access for a non-party to the material used at those hearings.

25. Applying the above reasoning to the present case where the order of 26 November 2018 was made without a hearing in open court, but after the court considered certain documents on the papers, the principle of open justice is engaged in relation to matters which involved a judicial decision. As regards matters which were agreed between the parties and which did not involve a judicial decision, the principle of open justice is not engaged save that there remains a power for the court to permit access to documents filed with the court if there are strong grounds for holding that such access is necessary in the interests of justice."

35. Reliance was placed on two authorities as demonstrating the courts willingness to facilitate access to court files to deploy the material inspected in other proceedings, *Sayers v Smithkline Beecham Plc* [2007] EWHC 1346 (QB) and *HSH Nordbank AG v Saad Air* [2012] EWHC 3213 (Comm). Both cases involved a general CPR rule which did not distinguish between inspection as of right and the need for "special leave" as under CWR Order 26 rule 4. In *Smithkline*, the US Secretary of State sought access to expert evidence filed in the English MMR/MR Vaccine litigation for the defence of similar claims under a statutory no fault compensation scheme in the US. Keith J held:

"*24. In my view, the Secretary for Health undeniably has a legitimate interest in having access to copies of Professor Bustin's first report and the reports of Professor Simmonds and Professor Rima. The issue whether the MMR vaccine, whether on its own or whether combined with vaccines containing thimerosal, cause disorders in the autistic spectrum and other disorders, is of immense public interest and importance. It would not serve the interests of justice if the special masters were denied evidence which is said to undermine a key plank of the petitioners' case. The special masters would be getting a completely one-sided picture if they were not allowed the opportunity to consider that evidence. If, in*

> *truth, Unigenetics' methodology for analysing the data produced by the tests on the specimens was flawed, it is extremely desirable that that is exposed. On the other hand, if the methodology turns out not to be flawed, it is just as desirable that the concerns which have been raised over its reliability should be laid to rest. It is axiomatic that the special masters should have at their disposal the best evidence which is available. The need to spare the special masters from coming to a conclusion based on an analysis of only part of the potentially available evidence amounts to special circumstances which, on the face of it, justifies the Secretary for Health having access to copies of the reports.*"

36. In *HSH Nordbank AG*, the non-party applicant "Jet" had obtained a Swiss freezing order in relation to the same aircraft that the English plaintiff was seeking summary judgment against. Jet sought access to the summary judgment application papers which it contended were relevant to the merits of the Swiss Proceedings. Field J (as he then was) held:

> "*23. No evidence of the Swiss and French law as to the priority of security interest was placed before the court, but I think it a fair inference that the relevant principles will be similar to those applicable in England, and thus they will have regard to the timings of the creation of the competing interests and knowledge of prior interests, whether actual or constructive through registration. Given in particular the declaration that is sought in HSH"s summary judgment application as to HSH"s priority over other creditors, it follows, in my view, that there strong grounds for concluding that it is necessary in the interests of justice that Jet be permitted to review the evidence filed by both sides in the summary judgment application before the summary judgment hearing to see if: (i) HSH was aware, or ought to have been aware, that a completion agreement was in contemplation at the time the first facility agreement was concluded; (ii) HSH knew of the completion agreement when the second facility agreement and both mortgages were executed and amended; (iii) HSH knew that Jet was asserting a right of retention and had obtained a saisie conservatoire when the loan under the first facility agreement was*

restructured on 10 November 2010. I also think that in the context of the Swiss proceedings Jet has a strong interest in having sight of any evidence relating to SAA 340's impecuniosity. Although the ultimate issue in those proceedings is whether SAA 340 was entitled to withhold payment, it is a legitimate objective for Jet to seek to demonstrate that SAA 340's defence is an unworthy contrivance, the real reason for the non-payment being SAA 340"s parlous financial position."

The Second Respondents' Submissions

37. In their Skeleton Argument, the Second Respondents submitted by reference to local decisions that the legal test for inspection was far narrower than the Non-Party Applicants contended:

"*22. The Companies Winding Up Rules 2018, Order 26, rule 4, under which Blue Water and Amida seek access to the Court File, provides that:*

'*(1) The following persons shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents –*

a) the liquidator;

b) any former liquidator or controller of the company;

c) any person who was a director or professional service provider of the company immediately before the commencement of the liquidation;

d) the Authority, in the case of a company which carried on a regulated business; and

e) any person stating himself in writing to be a creditor or contributory of the company

(2) The right of inspection conferred upon a person under this Rule may be exercised on his behalf by an attorney or other person properly authorised to act for him.

(3) Any other person may inspect the Court file by special leave of the Court.

(4) The right of inspection conferred by this Rule is not exercisable in respect of any documents (except the petition and Court orders) or parts of any documents which the Court has directed to be sealed pursuant to Order 23, rule 6.

(5) If, in the case of a person applying to inspect the Court file, the Registrar is not satisfied as to the propriety of the application, he may refuse to allow it, in which case such person may then apply forthwith and ex parte to a Judge who may refuse the inspection, allow it or allow it on such terms as he thinks fit."

23. In In the Matter of the Sphinx Group of Companies (in official liquidation) [2017] (1) CILR 176, at [25] the Court cited with approval observations made by Lewison J in ABC Ltd v Y [2012] 1 WLR 532 as to the approach of the court when considering an application for permission to access documents from a court file, saying:

'Lewison J (as he then was) explained that different considerations apply depending on whether the documents in question have been used at a public or a private hearing and on whether civil rights and obligations have been determined by the Court. The learned judge stated as follows, in summary:

25.1 Where documents have formed part of the Court's decision-making process at a public hearing, the principle of open justice has a part to play. In those cases, if the applicant can show a legitimate interest in having access to the documents, the Court should lean in favour of allowing access to the documents in accordance with the principle of open justice (para 42).

25.2 Where documents have not been read by the court as part of the decision making process, the Court should only permit access if there are "strong grounds for thinking that it is necessary in the interests of justice to do so" (para 42).

25.3 In a case where after due consideration the court has decided that a hearing should take place in private and an applicant seeks access, the Court must consider whether there are strong grounds for thinking it is necessary in the interests of justice that the applicant should have access to the documents he seeks in so far as they were deployed at hearings held in private (para 43).'

24. In Ahmad Hamad Algosaibi and Brothers Company v. Saad Investments Company Limited (in official liquidation) & Ors [2017] (2) CILR 788 ("AHAB") the Grand Court considered an application for permission to access documents on the court file at the conclusion of a trial.

24.1. The case was not an insolvency case, and therefore the application was made under the Grand Court Rules, which do not refer to "special leave", but instead provide that

'The Court may give leave on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings" (GCR Order 63, Rule 3(5)). The test in the insolvency context is therefore higher than in the context of ordinary civil litigation.

24.2. The Grand Court concluded that applications by non-parties for access, whether under court rules or on the basis of the open justice principle, may not be granted simply because they may be helpful for third party discovery; there must be at least a legitimate need for information for the better understanding of the court proceedings in question; where a situation is complicated, it will involve a fact-specific enquiry to be taken in the particular factual matrix; where other interests may be harmed or undue burdens placed upon either a party or upon the court in order to enable access, a balancing exercise guided by the discipline of proportionality will be required: AHAB, at [209].

25. Although the decision in AHAB was overturned on appeal, the conclusion above was not criticised."

38. In short, under Order 26 rule 4 (3) where "*special leave*" was required and open justice was not engaged, "*strong grounds for thinking that it is necessary in the interests of justice to do so*" must be shown, it was argued. This was essentially the same test for which the Non-Party Applicants contended. As regards the need to rely upon the JPLs' Reports, it was in essence argued that:

(a) the JPLs had as regards the BVI company RAGOF objected to their Reports being supplied to a director. It was unclear why a different approach should be taken in relation to the Cayman Funds (paragraph 47);

(b) any conclusions that the JPLs had reached were "*properly inadmissible and legally irrelevant as to the merits of any issue that Blue Water or Amida may have…The JPL Reports are at best secondary evidence, produced for a different purpose, and there is no basis for concluding that evidence as to the matters they address will not otherwise be before the Tribunal, so far as relevant*" (paragraph 48.1 (2), 48.3).

39. They evidentially relied on the fact that in the BVI Proceedings the JPLs had expressed the "strong preference" that their confidential Reports not be disclosed to third parties and the absence of any positive evidence of support from the JPLs for the Inspection Application.

Legal findings

40. The legal test for granting special leave to inspect a file in a winding-up matter under CWR Order 20 rule 4 (3) was essentially common ground and has been settled in this Court since Smellie CJ held in *In the Matter of the Sphinx Group of Companies (in official liquidation)* [2017 (1) CILR 176], at [25], citing Lewison J *in ABC Ltd v Y* [2012] 1 WLR 532 that absent open justice

considerations, inspection should only be permitted if there are "*strong grounds for thinking that it is necessary in the interests of justice to do so*".

41. The real controversy centred not on the parameters of the abstract legal test governing the Inspection Application, but rather on how that test should be forensically applied to the factual and legal matrices of the present case. The two cases aptly relied upon by Mr Collins KC as demonstrating a judicial willingness to facilitate deploying materials gained through inspecting one court's file in other proceedings are, carefully read, consistent with the restrictive terms in which the jurisdictional test is expressed. The grounds relied upon must (a) be "*strong*", and (b) support the view that granting inspection is "*necessary in the interests of justice*" [emphasis added]. Accordingly, the non-party inspection applications were granted effectively in aid of foreign proceedings:

    (a) in a case where the applicant was the US Secretary of Health and the expert evidence it was sought to deploy related to common issues of "*immense public interest and importance*" to the UK and the US: *Sayers v Smithkline Beecham Plc* [2007] EWHC 1346 (QB); and

    (b) in a case where there were overlapping enforcement of security and priority issues in relation to the same aircraft before the English and Swiss courts (and the applicant was seeking to indirectly enforce an interim freezing order-strictly a "*saisie conservatoire*" upheld by an appellate Swiss Court), Field J found "*strong grounds for concluding that it is necessary in the interests of justice that Jet be permitted to review the evidence filed by both sides in the summary judgment application*: *HSH Nordbank AG v Saad Air* [2012] EWHC 3213 (Comm).

42. The *Smithkline* case is an example of very clear public interests at play. The *HSH Nordbank* case on one view suggests a more flexible approach to permitting inspection based merely on overlapping factual and legal issues. However, if the factual and legal matrix of that case is

properly understood, the proper adjudication of the priority issues was being facilitated not just to assist the foreign court, but because the foreign adjudication had implications for the practical result in the English court. The legal policy interest in ensuring consistent findings in cross-border security enforcement proceedings and the way in which the evidence sought would be deployed in the foreign proceedings were very tangible and clearly understood. In a very broad sense, the legal context was analogous to cross-border insolvency proceedings where the need for cooperation between different courts is well understood.

Merits of Inspection Application

43. As attractive is the invitation to assist the fair and efficient adjudication of the LCIA Proceedings by granting the Inspection Application was made to appear by Mr. Collins KC, I am not persuaded that there are "*strong grounds in the interests of justice*" for acceding to it. The general desirability of avoiding the risk of inconsistent findings is untethered to any tangible negative impact on the findings which may be reached by this Court. The only significant documents uniquely embraced by this application are the JPL Reports. There is no suggestion that these documents can be directly applied as evidence before the Tribunal so their significance (despite their obvious general relevance to the LCIA Proceedings) is at best limited and at worst nebulous in the extreme. There are no open justice considerations supportive of the application at this stage although it is possible that the JPL Reports will enter the public domain at the trial stage and become available at the Arbitration hearing in any event. Bearing in mind the confidential nature of the JPL Reports and the general function that such reports serve, there is in my judgment an enhanced need for the interests of justice considerations supportive of inspection to be clear and compelling indeed[8].

[8] In response to the Court's request for editorial comments on a draft of this Judgment, Appleby fairly pointed out that this portion of the Judgment failed to explicitly deal with the Non-Party Applicants' submissions as to why the open justice principle was engaged in the present case. Notwithstanding the fact that the JPLs' Reports had been referred to in a judgment delivered following a Chambers hearing and having regard to the nature of such reports and the apparent reluctance of the JPLs that they be inspected (see paragraph 39 above), I concluded (as stated in paragraph 43 above) that there were "no open justice considerations supportive of the application at this stage". No need to reconsider this issue arises.

44. Finally, a consideration which applies with equal force to the Release Application is this. There is no recognized legal policy concept which justifies providing general case management assistance to foreign arbitration proceedings[9]. This Court is neither being invited by the Inspection Application to enforce the parties' contractual arbitration agreement nor to enforce an arbitral award. The Non-Party Applicants have alternative potential remedies available to them in the LCIA Proceedings, including adjusting the timetable of those proceedings to gain access to all material referred to herein at trial.

45. The Inspection Application is accordingly refused.

The Declaration Application

The Petitioner's Submissions

46. The Petitioner's Skeleton Argument set out the following central legal submissions:

> "*45. Parties are only obliged to give discovery of documents 'which are or have been in their possession, custody or power': GCR O.23, r.1. Where documents are or were originally held by third parties, ascertaining whether they or not they are discoverable can involve an investigation that is legal, factual or both:*
> *45.1. Whether or not documents that have never been held by or on behalf of the party are nonetheless within the power of that party, turns on whether the party has a 'presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else': Lonrho v. Shell [1980] 1 WLR 627, Lord Diplock at 635H.*

[9] This conclusion was based on the apparent consensus that there was no statutory basis for providing interlocutory support for foreign arbitration proceedings, a view which (as noted above) I now consider to be wrong.

45.2. Whether or not documents are or have been in the possession or custody of a party (eg. because they are held by an agent, such as a solicitor, or employee) is a question of fact. So is the question of whether there is or was any agreement or understanding with the third party that the party would be provided with access to documents.

46. The present application is focused on the second of these investigations. It is not alleged that the Second Respondents have a general, legal right to obtain all documents from other Floreat entities: only those that are held in some capacity for the Second Respondents (eg. by the investment advisers). What is alleged is that the other 'Floreat Clients' have already afforded the Second Respondents a right to review the 2TB of data obtained from the 61 custodians. This is sufficient to make them discoverable. See Berkeley Square v. Lancer Property [2021] EWHC 849 (Ch) at [27] – [46]. The following points, from the summary at [46], are particularly pertinent in the present case:

46.1. First, the relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship.

46.2. Second, there must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched.

46.3. Third, the existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor."

47. The evidential position was pivotally analysed in the following way:

"*47. Cooke 1 was clear:*

47.1. 2TB of data had been collected as part of the Second Respondent's discovery process in these proceedings.

47.2. The list of proposed search terms based on the current pleadings (i.e. before the Petitioner's proposed amendments to its winding up petition or any responsive amendments made to the Defence or Reply) sent to Appleby on 12 May 2022 has been applied across the data collected to date …": ¶ 20.2.1. In short, whoever the documents originally belonged to, they had allowed HSF – acting for the Second Respondents – to search all of them in order to identify documents relevant to these proceedings.

47.3. Further reviews were planned: ¶ 20.2.2 – 20.4.

48. Lombers 2 (269) ¶ 32.2 now asserts that, after applying the keyword searches, the documents were considered for possession, custody or power. That may be factually accurate, but it is too late. If the documents were not within the control of the Second Respondents before they were handed over by the custodians, they came within the control of the Second Respondents when they were handed over so that HSF – acting as solicitors for the Second Respondents, with oversight from Forbes Hare – so they could search them for relevance to these proceedings.

49. Furthermore, it is clear (Lewis-Hall 5 ¶ 8 – 16) that where the Second Respondents have wanted to deploy documents originally held by other Floreat Clients, they have been free to do so. For example:

49.1. Lewis-Hall ¶ 12 identifies RAGOF board minutes (including drafts), and emails relating to board minutes, that have been disclosed. There is no reason why these would

have been in the control of the Second Respondents to the Cayman proceedings before the discovery exercise. The obvious inference to draw from this is that the arrangements between the various Floreat Clients allowed the Second Respondents not only to search the custodians' documents for relevance, but also to deploy them where it was felt to be in their interests.

49.2. Lewis-Hall ¶ 14 identifies disclosed documents that were privileged to Mr Wang but held by FPL. Again, the Second Respondents can only have got hold of these as a result of the process described by Messrs Cooke and Lombers.

49.3. It is also clear from Lewis-Hall ¶ 15 – 16, that HSF and Forbes Hare also considered other documents originally held by FPL to be within the control of the Second Respondents as a result of the Second Respondents' discovery exercise. If these documents had not been within the Second Respondents' control, the Second Respondents would not have been able to deploy them in support of their Recusal Application.

49.4. The Second Respondents' List of Documents also identifies other documents that can only realistically have come into the control of the Second Respondents as a result of the discovery process.

50. Lombers 2 makes no attempt to explain any of these matters.

51. It is clear that there is and has been an arrangement or understanding between the Floreat Clients that the Second Respondents would be allowed to search all documents collected by HSF for relevance to the Petitions and deploy them to support their case. That is demonstrated both by the process that was originally described in Cooke 1 and the selective disclosure of documents that would not otherwise have been within the control of the Second Respondents.

52. On that basis, the Court is asked to declare that the documents comprising the 2TB of documents provided to HSF from 61 custodians as described in Cooke 1 at ¶ 20.1, together with any further documents provided to HSF as part of the data collection exercise described therein, are in the possession, custody or power of the Second Respondents and are therefore discoverable in these proceedings.."

48. In brief, the assertion was that because an entire suite of electronic documents belonging to various Floreat Clients were given to the Second Respondents' attorneys to identify documents which were liable to be disclosed in the present proceedings, all of those documents had come within the Second Respondents' possession, custody or power. At first blush this appeared to be an entirely straightforward proposition as regards that subset of the 2TB documents which were actually relevant and discoverable, provided that HSF were effectively given the right to disclose all such documents without further analysis.

The Second Respondents' Submissions

49. The Second Respondents set out the following summary of the legal principles which were not controversial:

"*26. GCR Order 24 rule 7(1) provides that a party is required to give discovery of "documents which are or have been in his possession, custody or power". In In the Matter of Investar General Partner Limited and others (Unreported, FSDs 146, 147, 148 and 196 of 2018 (IKJ), 27 July 2022), Kawaley J gave useful guidance as to the appropriate approach to be adopted in relation to applications which seek to determine the extent to which documents are caught by GCR Order rule 7(1). The following points are notable:*

26.1. Traditionally, the expression 'power' has been interpreted as meaning a presently enforceable right to obtain the documents from whoever actually hold the documents or an arrangement or understanding pursuant to which a parent company "has in practice

free access to the documents of" its subsidiaries would potentially support a finding that the documents were within the "power" of the parent company and therefore discoverable (at [6(8)], [14]-[19]).

26.2. Even where a subsidiary's documents are sought by a 100% parent, the existence of a common corporate structure may not be sufficient to oblige the parent to give discovery (at [6(9)]).

26.3. It is not sufficient that consent could be obtained if it were asked from the subsidiary; if there is no evidence of an existing right or understanding or arrangement giving a parent access to a subsidiary's documents, then the parent does not have the necessary control over its subsidiary's documents (at [7(17)-(18)]).

26.4. The essential question is to determine whether there is evidence that the parent company already had unfettered access to the subsidiary companies' documents or there is some prior arrangement or consent that the parent can search its subsidiaries records for discovery purposes (at [7(19)] and [12]).

26.5. The mere 'expectation that the subsidiary will in practice comply with the requests made by the parent company' is not sufficient to amount to 'power' over the documents. There is a fundamental distinction between (1) a state of affairs where a parent can potentially obtain whatever documents it needs from its subsidiaries because inter-group conflicts of interest will not ordinarily exist and so requests made of subsidiaries are likely to be granted; and (2) the type of arrangement or understanding which the law requires for discovery purposes (at [39]).

26.6. A qualifying arrangement or understanding must be reflective of an understanding or arrangement reached between the parent qua parent and the subsidiaries qua

subsidiaries in relation to the general or specific basis upon which the parent will be able to access its subsidiaries' records (at [39]).

26.7. An applicant for an order for specific discovery assumes (a) the burden of persuading the Court that the relief should be granted; and (b) the evidential burden of proving that the requisite interlocutory factual findings should properly be made. Accordingly the evidential burden lies on an applicant to show that particular documents are in the 'possession, custody or power' of a particular party and it is not for the other party (from whom discovery is sought) to have to show that the documents are not in its possession (at [20]-[23]).

27. A litigant will have 'power' over a third party's documents where the right to obtain the documents is immediately exercisable and not qualified: see Abdulhameed Dhia Jafar v Abraaj Holdings and others (Unreported, FSDs 150, 158 and 203 of 2020 (NSJ), 19 July 2022), at [46]."

50. The Second Respondents advanced five reasons for refusing the Declaration Applications, which may be distilled as follows:

(a) which documents were "*in the possession, custody or power of the Second Respondents is a matter of fact, dependent upon the legal relationships between the Second Respondents and the entities which provided the documents to HSF…Those are matters uniquely within the knowledge of the Second Respondents*…" (paragraph 52);

(b) the discovery timetable was based on the exercise that had in fact been carried out and if a fuller discovery exercise had to be carried out adjustments would have to be made to that timetable;

(c) certain documents had explicitly not been disclosed on the grounds that they were not within the Second Respondents' custody, possession or power and documents held by certain custodians excluded on the basis that they were unlikely to have any relevant material. Part of the process carried out by HSF included determining what documents were within the Second Respondents' custody, possession or control and other Floreat Parties only consented to disclosure of such documents as fell within this category;

(d) "*The fact that the process of seeking to identify whether certain documents were in the 'possession, custody or power' of the Second Respondents may not have been flawless is not evidence that the documents supplied to HSF, by persons and entities who are not party to these Proceedings, and who supplied those documents to HSF for entirely proper reasons, made those documents available to the Second Respondents. There is no basis for inferring that there were some arrangement or understanding sufficient to mean that the all documents held by the 61 custodians fall to be treated as being in the "possession, custody or power" of the Second Respondents*" (paragraph 55.4);

(e) "*…a finding to the effect that all the documents held by the 61 custodians are in the "possession, custody or power" of the Second Respondents would (a) be contrary to the clear evidence given by Mr Lombers to the opposite effect (which itself is a repetition of statements previously made to the Petitioner); and (b) directly affect the rights of entities which are not parties before this Court. In the light of those serious matters, the evidence necessary to make such a finding would need to be compelling*…" (paragraph 56).

51. These submissions shine a light on the particularities of how the discovery exercise was actually carried out. It is contended that that the various custodians explicitly limited the Second Respondents' right to disclose only those documents which were not only relevant but also within

the Second Respondents' custody or power. This approach was specifically adopted in the interests of expedition and compliance with a tight discovery timetable.

Merits of the Declaration Applications

52. At the end of oral argument, it seemed clear that the critical question was whether as a matter of legal principle the bare fact that the Second Respondents' attorneys were given access to an entire suite of documents including many not previously within their clients' custody, possession or power changed the status of those documents, express contrary agreement with non-party custodians notwithstanding. This was because although the Petitioner's understanding of how the discovery exercise had been carried out was plausible based on the material available to them before the present applications were made, it was ultimately clear that there was no basis for this Court to go behind the Second Respondents' more detailed evidential account of what actually occurred.

53. The evidence that HSF's clients' documents were held by various custodians together with documents over which prior to these proceedings the Second Respondents had no control was entirely credible on its face. In such a commercial context, with the onset of high-value commercial litigation, it is equally credible that the relevant commercial actors would have been advised of the implications of adopting the simplistic approach to discovery which the Petitioner suspected had occurred. It was deposed in the Second Lombers Affidavit as follows:

> "*18. Given the wide-ranging conspiracy alleged first in Bruno Wang's unsuccessful pre-action disclosure application, and then subsequently in the ex parte applications in the Cayman Islands and BVI, and in the Counterclaim in the LCIA Arbitration, HSF performed one document collection exercise in connection with all relevant proceedings. Data was collected from all the Floreat Clients. The data collection exercise was carried out in respect of all Floreat Clients for a number of reasons, including: (i) in order to preserve evidence from all Floreat Clients, a number of which were at the time the data collection commenced already involved in proceedings instigated by Mr Wang or*

involving his companies; (ii) to enable each Floreat Client to understand what, if any, relevance the broad allegations raised in a number of different jurisdictions and proceedings might potentially have for them; and (iii) because the documents of the various Floreat Clients are not all organised in such a way as to enable HSF efficiently to collect documents from only particular clients, both because different custodians have roles in more than one entity, and receive emails and other documents in relation to the different entities at the same address, and because the documents of the English Floreat entities are stored on one cloud server belonging to Floreat House Limited.

19. The documents collected from the Floreat Clients were processed and uploaded to one Relativity platform hosted by HSF. Each Floreat Client retained the right to control the use of its own documents. None of the Floreat Clients agreed to their documents being disclosed to or reviewed by other Floreat Clients (without their specific consent)…

20.1 HSF applied keyword searches over relevant custodians' data…from the entire universe of documents collected.

20.2 HSF, pursuant to its retainers with all the Floreat Clients, then considered only the documents responsive to those keywords, in order to identify those which were within the possession, custody or power of one of the parties to the Cayman Islands proceedings for whom HSF was acting. "

54. This was to my mind a bespoke, somewhat unusual yet commercially efficient arrangement where the same law firm conducting the discovery for litigation parties was, pursuant to multiple retainers, given control of the composite tasks of (a) identifying which documents held by both party and non-party custodians were relevant to the litigation and (b) ascertaining which of the relevant documents were in the custody, possession and power of the party custodians and liable to be disclosed in the present proceedings, and which were not. The arrangement as initially

described in the evidence raised potential concerns about conflicts of interest in the absence of the deployment of 'Chinese walls' with separate team members being assigned to separate tasks. How HSF managed the tasks was further explained in the Third Lombers Affidavit, however. Forbes Hare, the Second Respondents' Cayman Islands attorneys, only reviewed batches of documents identified as both relevant and likely to be within their litigation clients' control. As it was accepted that due to human errors in a process which was necessarily imperfect, some documents which may not originally have been within the Second Respondents' control were actually disclosed. It is entirely understandable that the Petitioner formed the view that it did and chose to make the Declaration Application.

55. So was the Petitioner ultimately right to submit that the mere fact that the Second Respondents' lawyers took control of the entire suite of documents was sufficient to place all the relevant documents within the possession, custody or power of their litigation clients even if this occurred on express terms that non-party custodians retained custody, possession and power? In my judgment this question can only fairly be answered in the negative. It must be legally permissible for non-party custodians to expressly contract with lawyers acting for related litigation parties that they should manage the task of deciding both (1) which documents are relevant to the litigation and further (2) which documents are actually within the custody, possession and/or power of the related entities which are actually parties to the litigation. If the lawyers managing the discovery process for the Second Respondents (a) were not able to make documents available to the Second Respondents without either determining that they were prior to the litigation within their litigation clients' custody, possession or power and (b) required the further consent of non-party custodians to share their documents with the Second Respondents, this did not place the documents in the first instance within the power of the Second Respondents in the requisite legal sense.

56. As noted above, the Petitioner relied on *Berkeley Square v. Lancer Property* [2021] EWHC 849 (Mr Robin Vos sitting as a Judge of the Chancery Division) as accurately summarising the modern legal position:

"*46. Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:*

i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature."

57. In my judgment applying those principles, the Petitioner has failed to establish that the entire suite of documents received by HSF from the various Floreat custodians were all in their litigation clients' control. The Declarations Application is accordingly refused.

Summary

58. For the above reasons the Release Application, the Court File Application and the Declaration Application are respectively refused. I will hear counsel, if required, as to costs and the terms of the Order to be drawn up to give effect to these decisions.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT